IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

Case No. 78-215

FRED STEELE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

JAMES N. PERRY

1804 Carew Tower
Cincinnati, Ohio 45202
Telephone: 621-0442

Counsel for Petitioner

COURT INDEX PRESS, INC. — 215 E. Ninth Street, Cincinnati, Ohio 45202 — (513) 241-1450

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Petitioner prays that a writ of certiorari issue to review the judgment and opinions of the United States Court of Appeals for the Sixth Circuit entered in these proceedings on May 24, 1978, a Motion for Rehearing en banc being denied on July 18, 1978.

I. OPINION OF COURT BELOW

The opinion issued by the Sixth Circuit Court of Appeals on May 24, 1978, is not yet officially reported. The opinion and the Court's order denying the rehearing en banc appear in the Appendix to this Petition for Writ of Certiorari.

II. JURISDICTION

Petitioner Steele was convicted in the United States District Court of an offense under the provisions of 18 USC § 2314. An appeal as of right was filed on behalf of Steele in the United States Court of Appeals for the Sixth Circuit. The Petition for Writ of Certiorari to the Sixth Circuit Court of Appeals is sought under the provisions of Supreme Court Rule 19 (1) (b).

III. QUESTION PRESENTED

Is defendant's right to effective assistance of counsel violated when counsel undertakes dual representation of jointly indicated defendants and the trial court fails to advise the defendants of conflict of interest considerations resulting from dual representation so that each defendant might knowingly and intelligently waive his right to effective representation unimpaired by conflict of interest considerations?

IV. CONSTITUTIONAL PROVISIONS

The Sixth Amendment, Constitution of the United States:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy trial and public trial, by an impartial jury of the State and District wherein the crime shall have been committed, which District shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

V. STATEMENT OF THE CASE

Steele and a co-defendant were indicted for a violation of 18 USC § 2314.

A single lawyer represented both Steele and the co-defendant from the time of indictment through a trial by jury and sentencing.

The record contains no inquiry by the trial court concerning the dual representation by counsel of jointly indicted defendants.

Counsel for the jointly indicted defendants filed no documents with the Court concerning the dual representation or any waiver of defendants' rights in connection with the dual representation.

VI. BASIS FOR FEDERAL COURT JURISDICTION

Defendant was indicted by a Federal Grand Jury for a violation of 18 USC § 2314 in that he allegedly transported stolen goods in interstate commerce, and the value of said goods were in excess of $5,000.00.

VII. ARGUMENT IN SUPPORT OF ALLOWANCE OF WRIT

Supreme Court Rule 19, sub-paragraph 1, sub-paragraph b, provides amongst other things that the Court may grant a review on writ of certiorari when it is demonstrated that decisions of the Courts of Appeals are in conflict with one another.

In *Holloway* v. *Arkansas*, Sup. Ct. Case No. 76-5856, decided Apr. 3, 1978, —— US ——, 23 Crim. L. R. 3001, this Court expressly recognized a conflict in the circuits with regard to the affirmative duty of a trial court to assure that criminal defendants are not deprived of their right to the effective assistance of counsel by joint representation of conflicting interests.

Although this Court recognized the conflict amongst the circuits, it expressly declared the conflict would not be resolved by its decision in *Holloway*.

The DC Circuit, First Circuit Court of Appeals, Third Circuit Court of Appeals, Fourth Circuit Court of Appeals, and Eighth Circuit Court of Appeals all seem to impose on the trial court a mandatory duty to advise jointly indicted defendants represented by a single lawyer of the risks of dual representation so that the record reflects a waiver, knowingly and intelligently made, concerning the defendant's right to representation by counsel unimpaired by conflict of interest considerations. See, *Campbell* v. *U. S.*, 352 F. 2d 359 (CA DC 1965), *U. S.* v. *Foster*, 469 F. 2d 1 (1st CA 1972), *U. S. ex rel. Hart* v. *Davenport*, 478 F. 2d 203 (CA 3rd 1973), *U. S.* v. *Truglio*, 493 F. 2d 574 (4th Cir. 1974), and *United States* v. *Lawriw*, 568 F. 2d 98, (8th CA 1977).

The Sixth Circuit in its opinion dated May 24, 1978, states that the Sixth Circuit declines to follow the precedent

in *United States* v. *Lawriw*, 568 F. 2d 98, decided by the 8th Circuit.

The Sixth Circuit requires a showing of prejudice when there is dual representation by retained counsel. Requiring a showing of prejudice on the record is not a reasonable prerequisite for relief in such proceedings because, as this Court observed in *Holloway*, ". . . joint representation of conflicting interests is suspect because of what it tends to prevent the attorney from doing. For example, in this case, it may well have precluded defense counsel for Campbell from exploring possible plea negotiations and the possibility of an agreement to testify for the prosecution, provided a lesser charge or a favorable sentencing recommendation would be acceptable."

VIII. CONCLUSION

Petition for Writ of Certiorari to the Sixth Circuit Court of Appeals should be granted because the Sixth Circuit's decision in this case is in conflict with the decisions of other circuits, and this Court should define the scope and nature of the affirmative duty of a trial judge to assure that criminal defendants are not deprived of their right to the effective assistance of counsel by joint representation of conflicting interests.

Respectfully submitted,

JAMES N. PERRY
Attorney at Law
1804 Carew Tower
Cincinnati, Ohio 45202
Phone No. (513) 621-0442

APPENDIX

No. 77-5343

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. FRED STEELE AND HOWARD R. CHASTEEN, *Defendants-Appellants.*	ON APPEAL from the United States District Court for the Eastern District of Kentucky.

Decided and Filed May 24, 1978.

Before: WEICK, LIVELY and MERRITT, Circuit Judges.

PER CURIAM. The defendants, Steele and Chasteen, appeal their convictions for the offense of transporting stolen goods in violation of 18 U.S.C. § 2314. Their major argument on appeal is that the District Court erred by failing to conduct a hearing for the purpose of ascertaining on the record whether the defendants intelligently and voluntarily chose to be jointly represented by the same retained lawyer and by failing to advise the defendants of the potential risks of dual representation.

The defendants were represented by retained counsel of their choice. They argue that we should adopt a *per se* rule under the Sixth Amendment requiring District Judges

to conduct a conflict of interest hearing in all such cases, to advise the defendants of their rights to be represented by separate counsel and to warn them of the dangers of dual representation. We decline to adopt such a rule in cases involving counsel retained by defendants. The defendants in this case have not presented any claim of prejudice or demonstrated that there is a factual basis for a finding of a conflict of interest. We do not believe that in cases of dual representation by retained counsel the Sixth Amendment is violated simply by failure to conduct an inquiry into the possibility of conflicting interests, and we do not read *Holloway* v. *Arkansas,* decided by the Supreme Court, April 3, 1978, (46 U.S.L.W. 4289), as so requiring. We decline to follow the recent Eighth Circuit case, *United States* v. *Lawriw,* 568 F.2d 98 (1977), which adopts a *per se* rule. While we agree that it would be wise for District Courts to conduct a conflict of interest hearing in cases of dual representation by retained counsel, we do not belive that the Sixth Circuit Amendment requires a *per se* rule to this effect. A showing of prejudice is necessary where there is dual representation by retained counsel.

We find no merit in defendant Chasteen's other claims based on the sufficiency of the evidence, the admission of other similar wrongful acts, the District Judge's jury summation and instructions and the length of the sentence imposed.

Accordingly, we affirm the judgment of conviction entered by the District Court.

No. 77-5343

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

FRED STEELE AND HOWARD R. CHASTEEN,
Defendants-Appellants.

ORDER

(Filed July 18, 1978)

Before: WEICK, LIVELY and MERRITT, Circuit Judges.

No judge of the Court having moved for rehearing en banc, the petition for rehearing has been referred to the hearing panel for disposition.

Upon consideration, it is ORDERED that the petition for rehearing be and hereby is denied.

ENTERED BY ORDER OF THE COURT

/s/ JOHN HEHMAN
Clerk